EO: 200
BYE: 201725

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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SE 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0951

Reversed
Eligible

PROCEDURAL HISTORY: On July 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that benefits were not payable during the recess period between two academic years (decision # 94356). Claimant filed a timely request for hearing. On August 9, 2016, ALJ Vincent conducted a hearing, and on August 12, 2016, issued Hearing Decision 16-UI-65610 affirming the Department's decision. On August 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTERS: Although Hearing Decision 16-UI-65610 states that the ALJ admitted Exhibits 1 and 2 into the record, a review of the record shows that was not the case. Hearing Decision 16-UI-65610 at 1. To begin, Exhibit 1, a two page "Settlement Agreement" between the employer and claimant dated February 8, 2016 and offered by claimant at hearing, was marked but not admitted into the record by the ALJ because he concluded it was "not relevant." Audio Record ~ 32:00 to 34:30. Exhibit 2 does not appear to exist as it was not described, included in the record or discussed.

Claimant testified about portions of Exhibit 1 at the hearing. Audio Record ~ at 32:00 to 34:30. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The "Settlement Agreement," submitted by claimant and marked Exhibit 1, is relevant to the issue of the parties' intention regarding claimant's future employment, and its admission into evidence is necessary to complete the record in this case. Accordingly, claimant's Exhibit 1 is admitted into the record. Any party that objects to the admission of Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

In written argument dated August 23, 2016, claimant provided EAB with new information, an August 23, 2016 letter from the employer's assistant superintendent of human resources which stated that its representative's earlier statement to the Department that the employer had given claimant "reasonable assurance" of continuing employment for the 2016-2017 school year "was inaccurate."

Under OAR 471-041-0090 (October 29, 2006):

> Information not received into evidence at the hearing will not be considered on review, except, subject to notice and an opportunity to be heard:
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> * * *
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> (2) New information may be considered when the party offering the information establishes that:
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> > (a) The new information is relevant and material to EAB's determination; and
> >
> > (b) Factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing; * * *

The new information offered by claimant consists of a clarifying letter regarding the central issue in the case, i.e., whether claimant had reasonable assurance of continuing employment for the 2016-2017 school year, and, consequently, is relevant and material. That the employer's representative would misrepresent the facts regarding that issue to the Department was not reasonably foreseeable under the circumstances. Ordinarily, remand would be required. However, claimant certified the new information was provided to the employer's representative on August 23, 2016 at its address of record, and the representative has made no argument or response. Given that the letter very likely is what it purports to be, we considered it in reaching this decision. The parties may object to our doing so, in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB Exhibit 1.

FINDINGS OF FACT: (1) From approximately 2010 to February 16, 2016, claimant worked for Battle Ground School District No. 119 (BGSD), an educational institution, as a full-time "intervention specialist", a drug and alcohol related administrative position. On February 16, 2016, claimant resigned from his position in accordance with the terms of a "Settlement Agreement" between the parties entered into to "resolve" their differences by virtue of a work separation and other consideration. Exhibit 1.

(2) Claimant filed an initial claim for benefits on June 29, 2016, during the second quarter of 2016. A claim filed during that quarter has a base year that is from January 1, 2015 to December 31, 2015.

(3) Claimant's base year employers were BGSD and Multnomah County School District No. 1 (MCSD)[1], both educational institutions. The Department determined claimant had a monetarily valid claim for weekly benefits in the amount of $514 based on his total base year wages which came exclusively from BGSD and MCSD.

[1] Claimant worked for MCSD as a seasonal employee (coach) during the 2015-2016 academic year. The Department has not identified MCSD as a party to this matter, and MCSD has not filed an appearance or objection to an award of benefits to claimant based on his base year wages from MCSD. Accordingly, MCSD has no standing in this proceeding and we assume without deciding that it has taken no position on the issues involved.

(4) The period between the 2015-2016 and 2016-2017 academic years for BGSD began June 15, 2016 and ended September 6, 2016 (weeks 24-16 to 36-16).

(5) Claimant claimed benefits for the week including June 26, 2016 through July 2, 2016 (week 26-16), the week at issue.

(6) Claimant earned more than $514 working for BGSD during at least one week of the 2015-2016 academic year. In past years, claimant had been notified of fall term teaching assignments for the next academic year and had received a letter of intent to hire claimant for the fall term by mid-June. BGSD neither notified claimant of a fall term teaching assignment nor sent him a letter of intent to hire him for the fall term of the 2016-2017 academic year. Claimant also had been made aware that his drug and alcohol related position was changing and that the employer was seeking candidates with a chemical dependency license, which claimant did not have. Moreover, claimant did not expect to be hired for the fall term after entering into the settlement agreement with BGSD in February 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ. Claimant is eligible for benefits during weeks commencing during the school recess period between BGSD's 2015-2016 and 2016-2017 academic years.

The Department determined claimant had a valid claim for benefits, i.e., was *monetarily* eligible, based on the total amount of his base year wages from all employers and that his weekly benefit amount was $514. However, when claims for benefits are based either solely, or primarily, on base-year wages from educational institutions, both ORS 657.167 and ORS 657.221 require a reduction in those benefits under certain prescribed conditions.[2] Here, claimant seeks benefits based on services performed for BGSD as a full-time intervention specialist. BGSD is an educational institution as defined in ORS 657.010(6).

[2] The unemployment insurance program is a joint federal and state program that was established in 1935 to provide a safety net for workers who become involuntarily unemployed. *See* Federal Unemployment Tax Act (FUTA), 26 USC §§ 3301 to 3311 and *Unemployment Compensation, Federal – State Partnership*, US Department of Labor, Office of Workforce Security, Division of Legislation, April 2005. Benefits are payable based not on need, but on a qualified wage record and re-employability. FUTA did not cover employment in educational institutions until the Employment Security Amendments of 1970 extended limited coverage to employment in higher educational institutions. In 1976, limited coverage was extended to elementary and secondary school employment. Pub L 94-566. The limitation was that benefits based on such employment would not be payable during periods between and within academic terms. *Id.* The policy reason for that reduction in benefits was that the cost of coverage, without the limitations, placed too great a financial burden on "educational employers," whose sole resource, usually, is tax dollars. Most, if not all, educational employers are "reimbursable employers," i.e., they are not entitled to "relief of charges," but must reimburse the Employment Department Trust Fund dollar for dollar for any benefits paid their unemployed workers. *See* ORS 657.471(6).

The reduction in benefits mandated by the Unemployment Compensation Amendments of 1976 (PL 94-566) applies to specified employment and is based on established criteria in terms that have a precise meaning. Oregon was not required to conform to the federal law in this area but chose to do so to obtain the substantial financial benefits that would result. The choice to engage in this "cooperative federalism" led Oregon to adopt ORS 657.167 and ORS 657.221, among other state provisions, and requires Oregon to interpret them in a manner consistent with federal legislative intent. *See Salem College & Academy, Inc. v. Employment Division*, 298 Or 471, 695 P2d 25 (1985). If found to be out of conformity, Oregon stands to lose all of administrative funding for the unemployment insurance program (e.g., $48.6 million in federal fiscal year 2004), and its employers would have to pay their full FUTA tax obligation (e.g., an increase of approximately $471 million over the $71 million they paid in 2005). *See* Fiscal Impact Statement on SB 447 by the Employment Department, prepared by Robin Kirkpatrick, March 13, 2005.

Therefore, ORS 657.221, which applies to services performed for educational institutions by individuals such as claimant, in other than an instructional, research or principal administrative capacity, limits when those benefits may be paid, if prescribed conditions are satisfied.

The Employment Department adopted a rule, effective January 29, 2007, exempting certain individuals from the reduction in benefits required by ORS 657.221.[3] That rule provides in relevant part:

> (1) ORS . . . 657.221 appl[ies] only when the individual claiming benefits was not unemployed as defined by ORS 657.100 in the period immediately preceding the holiday, vacation or recess period. . . . Where the week(s) claimed commenced during a customary recess period between academic terms or years, the relevant period is the academic year or term immediately prior to the recess period.
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> (2) The provisions of ORS . . . 657.221 apply irrespective of whether or not the individual performed services only during an academic year or in a year-round position.

Because claimant seeks benefits for the week including June 26, 2016 through July 2, 2016 (week 26-16), the relevant period under OAR 471-030-0074 is the 2015-2016 academic year of BGSD.[4] ORS 657.100 provides that an individual is unemployed in any week in which the individual earns less than his (or her) weekly benefit amount. Because claimant earned more than his weekly benefit amount of $514 during at least one week of the 2015-2016 academic year, he is not exempted by OAR 471-030-0074 from the provisions of ORS 657.221.

The first condition that must be met before the reduction in benefits required by ORS 657.221 may be applied is that the benefits sought must be for a week that commenced during a customary vacation period, holiday or summer recess observed by the educational institution for which the services were performed during the base year.[5] BGSD's summer recess period between its 2015-2016 and 2016-2017 academic years began on June 15, 2016 and ended September 6, 2016 (weeks 24-16 to 36-16). Claimant claimed benefits for the week including June 26, 2016 through July 2, 2016 (week 26-16), which commenced during that recess period. Therefore, the first condition is satisfied.

The second condition that must be met is that claimant must have performed services for one or more educational institutions during the academic year immediately prior to the recess period. Claimant worked as an intervention specialist for BGSD, an educational institution, during the 2015-2016 academic year. The second condition is satisfied.

The third condition that must be satisfied is that claimant must have had "reasonable assurance" of continuing work in the 2016-2017 academic year.[6] In order to establish "reasonable assurance" under

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[3] OAR 471-030-0074 (January 29, 2007). *See also* ORS 657.100(1); *Hutchinson v. Employment Division*, 126 Or App 717 (1994) and *Salem-Keizer School District #24J v. Employment Department*, 137 Or App 320 (1995).

[4] *Friedlander v. Employment Division*, 66 Or App 546, 676 P2d 314 (1984).

[5] ORS 657.167 and ORS 657.221.

[6] *See* OAR 471-030-0075 (January 29, 2007).

ORS 657.221(2)(b), the work offered must be 1) in the same or similar capacity, and 2) on economic terms and conditions not "substantially less" than the economic terms and conditions of the work performed during the previous academic year. "Same or similar capacity" refers to the type of services provided, i.e., either a "professional" capacity as provided by ORS 657.167 or a "nonprofessional" capacity as provided by ORS 657.221.[7] Economic terms and conditions are "substantially less" when the weekly wages or average number of hours are "substantially less".[8] Whether the economic terms and conditions are "substantially less" is determined according to state law, and not subject to federal conformity requirements.[9]

In Hearing Decision 16-UI-65610, after finding that claimant's full-time employment with BGSD would have continued during the 2016-2017 academic year had he not quit in February 2016, the ALJ concluded that claimant had reasonable assurance of continuing employment and was not entitled to benefits during the school summer recess period. Hearing Decision 16-UI-65610 at 2-3. We disagree.

OAR 471-030-075 provides, in relevant part, as follows:

> "Reasonable Assurance" Defined
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> (1) With respect to the application of ORS 657.167 and 657.221, "reasonable assurance" means a written contract, written notification or any agreement, express or implied, that the employee will perform services immediately following the academic year, term, vacation period or holiday recess which is in the same or similar capacity unless the economic terms and conditions of the employment in the second year or period are substantially less than the employment in the first year or period. A finding of reasonable assurance may be based on the totality of circumstances.
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> ***
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> (4) Reasonable assurance cannot be ended or abated by any unilateral action of the individual. A decision to quit work, even for good cause, and even if the employer accepts the resignation, does not end or abate reasonable assurance.

OAR 471-030-0075 (January 29, 2007).

The Oregon Court of Appeals has determined that "reasonable assurance" requires some evidence of mutual commitment and assurance between claimant and the employer so that a claimant can be said to

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[7] OAR 471-030-0075(3). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87. OAR 471-030-0075(3). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

[8] OAR 471-030-0075(2). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

[9] *See* UIPL No. 04-87; *Johnson v. Employment Division*, 59 Or App 626, 651 P2d 1365 (1982) (discussing *Mallon v Employment Division*, 41 Or App 479, 599 P2d 1164 (1979)).

have a reasonable expectation of returning to employment in the next academic year. *Friedlander v Employment Division*, 66 Or App 546, 676 P2d 314 (1984). Here, there was no evidence of any commitment or assurance by BGSD such that claimant could reasonably expect to return as an intervention specialist or in a related capacity in the 2016-2017 academic year. Claimant had not been notified of a fall assignment by mid-June, contrary to his experience over six years. Audio Record ~ 28:00 to 31:00; EAB Exhibit 1. Claimant had been made aware that the employer was seeking candidates with a chemical dependency license, which he did not have. Audio Record ~ 26:45 to 27:45. Moreover, the fact that the parties had entered into a settlement agreement to "resolve" their differences which required a mutually-agreed-to "separation" from employment suggested that claimant's separation from employment was not the result of a unilateral action on claimant's part, but rather suggested that neither party realistically expected claimant to return to employment with BGSD. Exhibit 1. Based upon the totality of the circumstances, claimant did not have reasonable assurance of continued employment in the 2016-2017 academic year. Accordingly, the third condition is not satisfied.

The prescribed conditions of ORS 657.221 have not been shown to have been satisfied with respect to benefits based on claimant's base-year wages from BGSD. Accordingly, those benefits are not subject to the reduction contemplated by ORS 657.221 and benefits are payable during the week at issue (week 26-16) which commenced during the recess period between BGSD's 2015-2016 and 2016-2017 academic years.

DECISION: Hearing Decision 16-UI-65610 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: <u>September 28, 2016</u>

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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